



meaning of Section 1302(p) of the Act.<sup>1</sup>

On December 9, 2002, Local 842 filed an unfair labor practice charge alleging that by unilaterally changing the pay period for bargaining unit employees from a weekly to a biweekly payroll without first bargaining with the Union, the State violated Sections 1307(a)(1) and (a)(5) of the PERA.<sup>2</sup>

On December 24, 2002, the State filed its Answer denying the Charge. A hearing was held on April 2, 2003, at which the parties presented testimony and documentary evidence in support of their respective positions. The parties submitted written post-hearing briefs the last of which was filed with the Public Employment Relations Board ("PERB") on June 20, 2003. The following decision results from the record thus compiled.

On August 18, 2003, the Executive Director ruled that by unilaterally altering the status quo of a mandatory subject of bargaining without first bargaining with the Union the State violated Sections 1307(a)(1) and (a)(5) of the Act, as alleged.

In light of the decision sustaining the Union's position on the merits, the Executive Director ordered that the parties attend a conference meeting on September 16, 2003, in order to discuss the remedy in this matter. This remedy decision results from the record created by parties and the meeting of September 16, 2003.

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<sup>1</sup> The Delaware Authority for Regional Transit ("DART") was created by the Delaware General Assembly in 1969 as a provider of public transit. In 1994 the General Assembly created the Delaware Transit Corporation (DTC) to oversee DART and the operation and management of the public transit system within Delaware. Currently, DTC is responsible for overseeing bus service along fixed routes throughout the State (Now "DART First State").

<sup>2</sup> 19 Del.C. Section 1307, Unfair Labor Practices provides, in relevant part:

(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

## DECISION

The Public Employment Relations Act charges the PERB with promoting harmonious and cooperative relationships between public employers and their employees and with protecting the public by assuring the orderly and uninterrupted operations and functions of the public employer. In order to effectuate this policy, PERB is empowered to assist in the resolution of disputes between public employers and employees and to issue appropriate remedial orders when it finds a party has committed an unfair labor practice. 19 Del.C. §1301; §1308.

This case presents a unique set of circumstances. The State of Delaware has been experiencing a budgetary short-fall for more than a year, including all times relevant to this charge. All State agencies were mandated by the Governor to take all measures possible to capture savings on expenditures and were under a hiring freeze.

DART/DTC is an agency of the State of Delaware, Department of Transportation. The August 18, 2003, decision in this case described a unique set of circumstances which precipitated DART/DTC's change in the payroll period:

[Computer] software purchased in 1999 for processing payroll and human resource matters was not functioning effectively resulting in significant and unplanned operating and maintenance costs. Prior to the conversion to a biweekly payroll, DART's payroll system was not part of the State-wide system used by all other State agencies. Consequently, DART did not enjoy the benefit and economies of the statewide system.

It is clear that replacing the ineffective and costly DART/DTC system by moving the statewide payroll system was a prudent decision. The record also supports the conclusion

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(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

that such a move was in the public interest under the State's financial circumstances at the time.

The mistake DART/DTC made was in not bringing the impact of this decision to change payroll systems to the negotiating table to confer and negotiate in good faith with the ATU. Because the agency chose to unilaterally impose a change in the payroll period as a consequence of its decision to migrate to the statewide computer system, it was found to have violated its duty to bargain in good faith, a fundamental requirement of both employers and unions under the PERA.

The customary remedy in a failure to bargain case is to return the parties to the status quo which existed prior to the unlawful change, and to then require the parties to negotiate a path forward, as if the change had never been made. Upon review of the entire record in this matter and discussions with the parties, it is clear that the customary remedy would wreak more havoc, have substantial costs for both the employees and DART/DTC, and would be contrary to the public interest PERB is charged with protecting.

Specifically, significant resources were expended in converting from the old payroll system to the statewide system. The old system ceased operations once the migration was completed in or about January 2003. To recreate a system similar to the old system for the purposes of returning to a weekly pay period for the period in which the parties are in negotiation on this limited issue, would require additional and significant costs, if it is even possible. This would constitute an unnecessary cost which would be unsupportable under the PERA framework.

As part of its unilateral decision to switch from a weekly to a biweekly payroll period, DART/DTC created a "bridge" to facilitate the transition for bargaining unit employees. Full time employees received moneys equal to 120 times their hourly rate and

part-time employees received moneys equal to 90 times their hourly rate. These moneys were paid in the following manner:

Date Check Received	Earned Wages or Unearned "Advance"	If wages, for hours worked in the week ending:
12/06/02	Earned Wages	week ending 11//30/02
12/13/02	Unearned Advance	Full-time = 40 hours Part-time = 30 hours
12/20/02	Unearned Advance	Full-time = 80 hours Part-time = 60 hours
12/27/02	Earned Wages	weeks ending 12/07 & 12/14

The next check would have been received on January 10, 2003, and would have included wages for hours worked during the weeks ending December 21 and December 28.

At the end of this transition period, wages were paid biweekly and payment was lagged two weeks after the close of wage earning period. Consequently, employees will not realize the full impact of the transition until they terminate their employment with DART/DTC and receive a larger final paycheck which includes the lagged wages.

Following the customary remedy of restoration of the status quo, the bargaining unit employees would also be required to reimburse DART/DTC the full value of the advances. Again, using rough approximations on hourly rates, total moneys would fall in the following range:

	\$12/hour rate	\$15/hour rate	\$17/hour rate
Full-time (120 hrs.)	\$ 1,440	\$1,800	\$ 2,040
Part-time (90 hrs.)	\$ 1,080	\$ 1,350	\$ 1,530
37.5 hr/wk Employees (112.5 hrs.)	\$ 1,350	\$ 1,687.50	\$ 1,912.50

Parallel to requiring the employer to recreate a computer system that no longer exists simply for the purpose of resurrecting the status quo during a period of negotiations, to

require the reimbursement of these moneys from approximately 230 bargaining unit employees, would also pose a significant hardship for the employees. These employees were required to make changes in their personal financial relationships in order to adapt to the change from a weekly to a biweekly payroll period. To require these employees to again make changes more than ten months later, which might again have to be reverted after negotiations, would cause further injury and inconvenience to the employees.

The final consideration in crafting this remedy is what the consequences might have been had DART/DTC not unilaterally implemented the change in payroll period, but rather brought the issue to the bargaining table. If the parties were unable to reach agreement during the course of their negotiations, PERB impasse resolution procedures could have been invoked.<sup>3</sup> The impasse resolution procedures culminate in binding interest arbitration, under which an arbitrator is constrained to choose between the entire last, best and final offer of each party. The decision of the arbitrator becomes the contract; there is no opportunity for the union membership to either accept or reject the decision through a ratification process, nor for the employer to choose not to implement the new contract. The parties are bound by the arbitrator's decision for the duration of the new contractual term.

Based on the equities as described herein, and considering the State's financial situation and the potential savings from the transition, there is a high probability that DART/DTC might have prevailed on the merits had the impasse been limited to the single issue of the payroll period. Under these circumstances, the public interest is best served by providing public notification that DART/DTC committed an unfair labor practice by failing to bargain with respect to a mandatory subject of bargaining; allowing bargaining unit

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<sup>3</sup> It should be noted that 19 Del.C. §1316 prohibits Delaware public employees from striking.

employees to retain the unearned advances; and allowing the State to retain the operational and financial benefits of the transition to the statewide computer system.

DART/DTC is cautioned, however, that it is well-advised in the future to abide by its statutory responsibility to engage in good faith collective bargaining on matters concerning or related to wages, salaries, hours, grievance procedures and working conditions, as mandated by the PERA. Where there is a question as to whether a matter must be negotiated, there is a statutory mechanism for requesting a declaratory statement. A belief that collective bargaining on a mandatory subject of bargaining would not be productive does not alleviate the employer of its responsibility to engage in good faith negotiations. If progress is, in fact, not possible, the employer should advance the negotiations for resolution through the impasse resolution process rather than unilaterally acting in derogation of its duty to bargain in good faith.

Finally, the instant unfair labor practice charge was amended by ATU Local 842 on May 28, 2003, to include a charge that DART/DTC also unilaterally changed from a weekly to a biweekly payroll period for a second ATU bargaining unit consisting of statewide Paratransit and Greater Dover Area Fixed Route employees. Because the amendment was filed after the hearing on the initial charge, PERB advised the parties it would continue to process the initial charge to decision, and would simultaneously initiate the hearing procedure for the amended allegations concerning the unit of Dover area employees.

The parties agree that the facts underlying the amendment to the charge are sufficiently similar to the extent that they concern a change to a biweekly payroll period, that the Paratransit and Greater Dover Area Fixed Route employees received similar advances to bridge the transition period, and that DART/DTC relied upon the same reasons for making the change.

Though DART/DTC has maintained that there are valid reasons for examining the affected bargaining units in a different manner, I find that the decision reached in this initial case involving the DART drivers is sufficiently similar to serve as precedent, and therefore, is directly applicable to and resolves the amended charge.

**WHEREFORE**, DART/DTC is ordered to post copies of the Notice of Determination in all locations where notices affecting bargaining unit employees are normally posted, including in the workplace and in the DART/DTC administrative offices. These notices must remain posted for a period of thirty (30) days.

**IT IS SO ORDERED.**

/s/Charles D. Long, Jr.  
CHARLES D. LONG, JR.  
Executive Director  
Del. Public Employment Relations Bd.

/s/Deborah L. Murrery-Sheppard  
DEBORAH L. MURRAY-SHEPPARD  
Principal Assistant  
Del. Public Employment Relations Bd.

Dated: 15 October 2003